84-333

No.

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

**STEVE RICHARDS,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. A. Was petitioner denied his constitutional right to an individualized sentence by the application of a mechanical sentencing policy?

   B. Did the trial court err in refusing to grant an evidentiary hearing to determine if marijuana traffickers in fact receive fixed sentences?

2. Is Title 21 U.S.C. §841(6) unconstitutional as a denial of equal protection because it establishes a penalty enhancement only in marijuana cases and only where more than one thousand pounds are involved?

## LIST OF ALL PARTIES TO PROCEEDINGS BELOW

The caption of this case in this Court contains the names of all parties to the proceedings to be reviewed.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Questions Presented for Review | i |
| List of All Parties to Proceedings Below | i |
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Constitutional and Statutory Provisions Involved | 2 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 5 |
| I. A. Statements By The Trial Judge Indicate a Mechanical Sentencing Policy Is Applied In Marijuana Cases, Denying Petitioner His Constitutional Right To An Individualized Sentence | 5 |
| B. The Trial Court Erred In Refusing To Grant An Evidentiary Hearing To Determine If Marijuana Traffickers In Fact Receive Fixed Sentences | 7 |
| II. Title 21 U.S.C. §841(6) Is Unconstitutional As A Denial of Equal Protection Because It Unreasonably Isolates Marijuana Traffickers For a Penalty Enhancement, Which Penalty Arbitrarily Applies Only To Traffickers of Over One Thousand Pounds | 9 |
| Conclusion | 12 |
| Appendix | |
| Opinion of The United States Court of Appeals for the Fourth Circuit | App. 1 |

# TABLE OF AUTHORITIES

## *Cases*


| | PAGE |
|---|---|
| Berger v. United States, 255 U.S. 22 (1921) | 7 |
| Chitimacha Tribe of Louisiana v. Harry L. Lewis Co., 690 F.2d 1157 (5th Cir. 1982) | 7 |
| Enmund v. Florida, 458 U.S. 782 (1982) | 6 |
| McLaughlin v. Florida, 379 U.S. 184 (1964) | 10-11 |
| Phillips v. Joint Legislative Committee, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982) | 7, 8 |
| Reed v. Reed, 404 U.S. 71 (1971) | 10 |
| Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) | 10 |
| United States v. Baker, 487 F.2d 360 (2d Cir. 1973) | 5 |
| United States v. Cavazos, 530 F.2d 4 (5th Cir. 1976) | 5 |
| United States v. Clark, 605 F.2d 939 (5th Cir. 1979) | 8 |
| United States v. Clements, 634 F.2d 183 (5th Cir. 1981) | 8 |
| United States v. Duran, 687 F.2d 348 (11th Cir. 1982) | 5-6 |
| United States v. Hartford, 489 F.2d 652 (5th Cir. 1974) | 5 |
| United States v. Serrano, 607 F.2d 1145 (5th Cir. 1979), *cert. denied*, 445 U.S. 965 (1980) | 7 |
| United States v. Thompson, 483 F.2d 527 (3d Cir. 1973), *cert. denied*, 415 U.S. 911 (1974) | 8 |


## *Constitutional Provisions*


| | |
|---|---|
| Fifth Amendment | 1 |

*Statutes*

PAGE

21 U.S.C. §841 ..... 2, 11

28 U.S.C. §144 ..... 2, 7

*Miscellaneous*

1980 United States Code Congressional and Administrative News ..... 10

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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### OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is set forth in the Appendix. App. 1-7.

### JURISDICTION

The decision of the Court of Appeals was entered on July 3, 1984. This petition is filed within 60 days of that date. This Court's jurisdiction is based upon 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Equal protection principles implicit in the fifth amendment command that "No person . . . shall be . . . deprived of liberty . . . without due process of law."

21 U.S.C. §841:

> (a) *Unlawful acts.* Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
> >
> > (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.
>
> (b) *Penalties.*
>
> (6)In the case of a violation of subsection (a) involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. . . .

28 U.S.C. §144:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

## STATEMENT OF THE CASE

Federal Jurisdiction in the United States District Court for the District of South Carolina at Charleston was based on petitioner's alleged violation of 21 U.S.C. Sections 841(a)(1) and 846, conspiracy to possess with intent to distribute more than one thousand pounds of marijuana.

The controversy arose out of a reverse role undercover operation in which two federal agents, Mr. Latson and Mr. Greagor, posed as sellers of marijuana. Agents Latson and Greagor conducted their undercover operation in Charleston, South Carolina and there met Bill Jordan, William Fioretti and Craig Wiggen. The three men expressed an interest in purchasing a small amount of marijuana from the agents. They were willing to spend Two Hundred Fifty Thousand Dollars. ($250,000.00), which would buy less than one thousand pounds at Three Hundred Dollars ($300.00) a pound. Throughout purchase negotiations, agents Latson and Greagor urged Jordan, Fioretti and Wiggen to purchase a larger amount (approximately two thousand pounds) than the three men had originally proposed.

Wiggen, Jordan and Fioretti met with agents Latson and Greagor to show them the money they then had available to buy into the load of marijuana. It amounted to One Hundred Thousand Dollars ($100,000.00), Fiften Thousand Dollars ($15,000.00) of which the agents retained for expenses. Subsequently, the federal agents again met with Jordan and Fioretti. At this time Fioretti and Jordan indicated they could arrange for an additional One Hundred Eighty Thousand Dollars ($180,000.00) to be used for the purchase of marijuana. It was determined that the additional One Hundred Eighty Thousand Dollars ($180,000.00) plus the original One Hundred Thousand Dollars ($100,000.00) would buy approximately one thousand pounds. At this meeting Latson and Greagor took an

additional Twenty Thousand Dollars ($20,000.00) for expenses.

Eventually, after Latson and Greagor continued to urge a sale of at least two thousand pounds, Latson, Greagor, Fioretti and Jordan agreed that in exchange for their Two Hundred Eighty Thousand Dollars ($280,000.00), Fioretti and Jordan would take delivery of the entire two thousand pounds and immediately sell a portion of it to pay the balance owing Latson and Greagor.

Meanwhile, Wiggen contacted petitioner Richards and informed him that Fioretti, acting as a distributor, would sell Richards marijuana at Three Hundred Twenty Dollars ($320.00) a pound.

Richards did not know, nor had he met, Jordan, Fioretti, Latson or Greagor. Richards did not participate in the previous negotiations and agreement between Jordan, Fioretti, Latson, and Greagor.

Subsequent to the contact from Wiggen, petitioner Richards travelled to South Carolina with approximately One Hundred Eighty Thousand Dollars ($180,000.00). Richards, Fioretti and Wiggen then met with agent Greagor so that Greagor could see the $180,000 that Richards had brought with him. This was the first time Richards had met Greagor or Fioretti. Upon display of the money, agent Latson arrived and Wiggen, Fioretti, and Richards were arrested.

On November 23, 1982, a criminal Complaint was filed charging Steve Richards, Jon Jahn, Craig Wiggen, William Fioretti, William Jordan and Lee Davidson with conspiracy to possess with intent to distribute two thousand pounds of marijuana, a Schedule I Controlled Substance, as set forth in 21 U.S.C. Section 812, in violation of Title 21, United States Code, Sections 841(a)(1), and 846, and Title 18, United States Code, Section 2.

## REASONS FOR GRANTING THE WRIT

### I.

### A. STATEMENTS BY THE TRIAL JUDGE INDICATE A MECHANICAL SENTENCING POLICY IS APPLIED IN MARIJUANA CASES, DENYING PETITIONER HIS CONSTITUTIONAL RIGHT TO AN INDIVIDUALIZED SENTENCE.

At issue in this case are several comments made by the trial judge to the jury prior to petitioner's sentencing. These comments reflect a fixed sentencing policy which focuses on the deterrent value of a jail sentence to the exclusion of other important goals (e.g. rehabilitation) and individual mitigating factors. Several circuits have strongly disapproved of a mechanical approach to sentencing, stating:

> We reaffirm our disapproval of statements by a trial judge reflecting a fixed sentencing policy based on the category of crime rather than on the individualized record of the defendant. This applies to statements reflecting a policy of never incarcerating, as well as to a policy of always imprisoning.

*United States* v. *Hartford*, 489 F.2d 652, 655 (5th Cir. 1974) and *United States* v. *Baker*, 487 F.2d 360, 361 (2d Cir. 1973). The Fifth Circuit has also warned, "Nor do we condone a mechanical sentencing policy that eliminates probation from consideration in every case in the category here involved [violation of narcotic law]" *United States* v. *Cavazos*, 530 F.2d 4, 6 (5th Cir. 1976).

The vice in mechanical sentencing is the judge's failure to exercise his judicial discretion by tailoring the sentence to fit the offender. *United States* v. *Duran*, 687 F.2d 348,

353 (11th Cir. 1982). Individualized consideration has been held to be a constitutional requirement. *Enmund* v. *Florida*, 458 U.S. 782, 798 (1982).

The trial judge in this case made the following remarks:

> Because I have established, say, in marijuana cases, a certain minimum sentence. And I don't like it. But at least in this area, different from Florida and New York, Judge Hawkins and I are determined we are going to wipe it out.
>
> . . . but I have established a policy that if somebody who is a truck driver, for instance, or who is an unloader, and with no previous history of marijuana crime is going to get a certain amount.
>
> And we are trying to stop it, Judge Hawkins and I here in Charleston, by meting out sentences that people will stay away from Charleston. (App. 265-267)

An additional indication of the judge's sentencing policy in marijuana cases was his discussion of a prior case:

> I had a fellow come in here a while ago. . . . The boy had never been in trouble; just graduated college. He flew down to fix a motor on a boat that had some marijuana. . . . While he was fixing the motor, they got caught. . . . He was just killing time. He was going to work in about a month. . . . You see kids like that. It was heartbreaking. *I had to put him in jail* (emphasis added). (App. 342)

On the basis of the above statements, it appears that the trial judge in this case and a fellow jurist entered an agreement which results in a mechanical sentencing policy. This policy eliminates probation from consideration in marijuana cases solely as a means of deterring future marijuana traffic in the Charleston, South Carolina area. Contrary to the mandate of the Supreme Court and various circuits, the policy ignores individual, case-by-case sentencing considerations.

## B. THE TRIAL JUDGE ERRED IN REFUSING TO GRANT AN EVIDENTIARY HEARING TO DETERMINE IF MARIJUANA TRAFFICKERS IN FACT RECEIVE FIXED SENTENCES.

Petitioner filed a motion with the district court requesting an evidentiary hearing to determine the extent of the sentencing policy indicated above. A motion for recusal of the trial judge was also filed, on the theory that the judge could not properly conduct a hearing concerning his own sentencing practice. The motions were denied. Justified by the necessity of a hearing to lay bare the sentencing process in the district court, petitioner maintains that the affidavit in support of the recusal motion was sufficient.

An affidavit alleging prejudice under 28 U.S.C. §144 must be taken as true for the purposes of recusal. The judge must pass on the legal sufficiency of the affidavit, but not on the truth of the matters alleged. *Chitimacha Tribe of Louisiana* v. *Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982); *Berger* v. *United States*, 255 U.S. 22 (1921). An affidavit is legally sufficient if it meets a three-part test: (1) the facts must be material and stated with particularity; (2) the facts must be such that, if true, they would convince a reasonable person that bias exists; (3) the facts must show the bias is personal, as opposed to judicial in nature. *Phillips* v. *Joint Legislature Committee*, 637 F.2d 1014, 1019 (5th Cir. 1981), cert. denied, 456 U.S. 960 (1982); *United States* v. *Serrano*, 607 F.2d 1145, 1150 (5th Cir. 1979) cert. denied, 445 U.S. 965 (1980).

Under the test, the district judge should have granted an evidentiary hearing and recused himself from the proceedings. The judge's statement, particularly as they implicate a fellow jurist, would convince a reasonable person that the court harbors a bias against marijuana traffickers.

It is more than a tendency to rule a particular way. Petitioner respectfully submits that the bias apparently involves an actual judicial arrangement to deny probation in marijuana cases.

In addition, petitioner's affidavit properly alleges a personal bias. The circuits have accepted the proposition that prejudice against a class, as opposed to a particular litigant, can form the basis for recusal. *Phillips* v. *Joint Legislature Committee, supra,* 637 F.2d at 1021; *United States* v. *Thompson,* 483 F.2d 527, 529 (3d Cir. 1973), cert. denied, 415 U.S. 911 (1974). The point of distinction between a judicial and personal bias is that a personal bias "stem[s] from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Clark,* 605 F.2d 939, 942 (5th Cir. 1979). The possibility of an agreement between judges to narrow the field of sentencing alternatives is clearly extrajudicial. Furthermore, it undermines the sentencing process and usurps congressional authority to set sentencing guidelines.

Having met the three-part test, petitioner's affidavit was sufficient to require a hearing concerning the district court's sentencing policy. "[A]n evidentiary hearing is required unless the record shows conculsively that petitioner is entitled to no relief." *U.S.* v. *Clements,* 634 F.2d 183, 188 (5th Cir. 1981).

## II.

## TITLE 21 U.S.C. §841(b)(6) IS UNCONSTITUTIONAL AS A DENIAL OF EQUAL PROTECTION BECAUSE IT UNREASONABLY ISOLATES MARIJUANA TRAFFICKERS FOR A PENALY ENHANCEMENT, WHICH PENALTY ARBITRARILY APPLIES ONLY TO TRAFFICKERS OF OVER ONE THOUSAND POUNDS.

Title 21 U.S.C. §841(b)(6) provides that anyone who commits an unlawful act involving a controlled substance, as prohibited in subsection (a), will be subject to a more severe sentence than otherwise provided if the controlled substance involved is marijuana in an amount over one thousand pounds. No other controlled substance is subject to a penalty enhancement regardless of the quantity involved or the classification of the controlled substance as found in 21 U.S.C. §812. Because the statute singles out marijuana, the class of individuals who commit a crime involving this substance face stiffer penalties than a similar class who commit a crime involving a substance on the same §812 schedule as marijuana. This arbitrary isolation of marijuana denies those individuals found utilizing the substance equal protection with other individuals found utilizing a substance of comparable danger as determined by 21 U.S.C. §811 and §812.

Likewise, the arbitrary and unreasonable determination that the quantity of one thousand pounds of marijuana should be the cut-off point for initiation of this penalty violates the equal protection rights of that class of individuals found with that substance in excess of one thousand pounds.

The legislative history of §841(b)(6), as found in Public Law 96-359, indicates that the purpose of the legislation is to provide a more severe penalty for that class of indi-

viduals involved in trafficking large amounts of marijuana as opposed to those who traffic in smaller quantities:

> Current law provides that individuals convicted of trafficking in marihuana, regardless of amount, are subject to a maximum five year prison sentence and/or a $15,000 fine. . . . Current law fails to distinguish between trafficking violations involving small versus large quantities of the drug.
>
> The Committee believes the current drug penalty structure with respect to marihuana, is inadequate to deter individuals and major criminal organizations involved in extensive trafficking operations. *1980 U.S. Code Congressional and Administrative News*, p. 2871.

What the legislative history does not say is why the Committee chose to differentiate between large and small traffickers in marijuana and not large and small traffickers in cocaine or any other controlled substances. Nor does the legislative history indicate how the Committee determined that an amount of marijuana over one thousand pounds is indicative of a large-scale operation while an amount of marijuana under one thousand pounds is merely a small scale operation.

The apparent object of the legislation is to penalize heavy traffickers of controlled substances. Yet by singling out only marijuana dealers and only those who control an amount over one thousand pounds, the object of the legislation is largely defeated.

In *Reed* v. *Reed*, 404 U.S. 71 (1971), the Supreme Court said, "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 76, quoting from *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). Again in *McLaughlin* v.

*Florida,* 379 U.S. 184 (1964), the Supreme Court said, "Judicial inquiry under the Equal Protection Clause . . . must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. . . ." *Id.* at 191.

The isolated penalty enhancement of marijuana without comparable penalty enhancement for similar controlled substances violates the rule established in *Reed.* There is no basis for the different treatment accorded cocaine or heroin users. The isolation of marijuana has no "fair and substantial relation to the object of the legislation" to deter heavy drug traffickers. Obviously not all persons similarly found in possession of a controlled substance on the same scale as marijuana are being treated alike. Some sustain penalty enhancers while others do not.

Finally, the arbitrary decision that a quantity in excess of one thousand pounds differentiates between a small and a large trafficker is not reasonable or based on any proof that such an amount truly separates the large from the small traffickers in furtherance of the object of the legislation.

Because of all the above arguments, 21 U.S.C. §841(6) should be declared unconstitutional as denying equal protection to that class of people found in possession of more than one thousand pounds of marijuana.

## CONCLUSION

For the foregoing reasons, petitioner respectfully submits that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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August 24, 1984

# APPENDIX

# APPENDIX

In The
UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 83-5189

United States of America,

Appellee,

v.

Steve Richards,

Appellant.

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
Sol Blatt, Jr., District Judge.
(CR 82-368)

Argued: May 11, 1984 Decided: July 3, 1984

Before WINTER, Chief Judge, CHAPMAN, Circuit Judge, and BUTZNER, Senior Circuit Judge.

WINTER, Chief Judge:

Defendant appeals from his judgment of conviction for conspiring to possess with intent to distribute more than 1000 pounds of marijuana in violation of 21 U.S.C. § 846. He argues that there was insufficient evidence that he participated in a conspiracy of this magnitude, that the

statute under which he was sentenced to nine years' imprisonment, 21 U.S.C. § 841(6), offends equal protection principles, and that the district court erred in denying his motion for recusal. Seeing no merit in any of defendant's contentions, we affirm.

I.

We first address the question of the sufficiency of the evidence. The evidence at trial demonstrated that two government agents posing as sellers in Charleston, South Carolina, agreed to sell 2000 pounds of marijuana to three men—Jordan, Fioretti, and Wiggen, a friend of the defendant's. Wiggen subsequently called the defendant in Wisconsin to tell him that he had "checked things out", that the marijuana was good, and that the defendant should bring as much money as possible to Charleston. The defendant then arrived with $180,000, a sum sufficient to purchase approximately 560 pounds. Before he could purchase any of the drug, defendant was arrested along with Wiggen and others.

Defendant argues that he was only part of a conspiracy to distribute the 560 pounds he had the money to purchase, not the larger conspiracy to distribute the 2000 pounds the government agents offered for sale. His argument, however, is unpersuasive. The question of whether an individual narcotics buyer is part of a conspiracy to distribute more drugs than he actually is prepared to purchase turns on his knowledge of any larger conspiracy. *See* United States v. Burman, 584 F.2d 1354 (4 Cir. 1978); United States v. DeNoia, 451 F.2d 979 (2 Cir. 1971). Thus, in *Burman*, we concluded that each buyer was part of the larger conspiracy because "from the nature of the contraband [heroin] and the vastness and regularity of their

own dealings, each reasonably knew that smuggling and various other illegal transactions were required to make their own dealings possible." 451 F.2d at 1356.

In this case, of course, the defendant had had no regular dealings with the government agents. But, even a single transaction may draw one into a larger conspiracy to violate the narcotics law if "there [is] independent evidence . . . that the defendant . . . had some knowledge of the broader conspiracy, or the single act itself [is] one from which knowledge may be inferred." United States v. DeNoia, 451 F.2d at 981. Here there was ample evidence that the defendant knew of the larger conspiracy to sell more than 1000 pounds of marijuana. Wiggen had told him to bring as much money as he could, clearly indicating that he could buy as much marijuana as he wanted. Further, Wiggen, Fioretti, and Agent Greagor all testified that the defendant participated in a conversation that made it clear that the deal involved a 2000-pound load of marijuana.

## II.

Defendant also contends that the statute under which he was sentenced is constitutionally infirm. The statute provides:

> In the case of a violation of subsection (a) of this section involving a quantity of marijuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter, subchapter II of this chapter, or other law of the United States relating to narcotic drugs, marihuana,

> or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

21 U.S.C. § 841(b)(6). It clearly imposes a much stiffer penalty for trafficking in more than 1000 pounds of marijuana than for trafficking in other non-narcotic controlled substances that have a high potential for abuse and no currently accepted medical use. (Schedule I drugs). *See* 21 U.S.C. §§ 812 & 841(b)(1)(B). Trafficking in other such drugs carries a maximum sentence of only five years and $15,000. Although the maximum prison sentence in § 841(b)(6) matches that for trafficking in heroin, the maximum fine exceeds that applicable to those convicted of trafficking in heroin. *Cf.* 21 U.S.C. § 841(b)(1)(A).

Defendant argues that § 841(b)(6) thus discriminates against marijuana offenders vis-a-vis drug offenders involved with substances of comparable or greater danger (other non-narcotic Schedule I drugs or narcotic Schedule I drugs such as heroin). This discrimination, he claims, denies him equal protection of the laws because it is unreasonable to treat the two classes differently. We disagree.

As defendant notes, the test of equal protection validity regarding this type of legislatoin is "whether the classifications drawn in [the] statute are reasonable in light of its purpose." McLaughlin v. Florida, 379 U.S. 184 (1964); *accord* New Orleans v. Dukes, 427 U.S. 297 (1976). A court does not concern itself as to whether the legislature made a correct judgment, but only whether it made a rational one. In other words, the test of constitutional validity is whether the legislature rationally could have decided that the classification would further the statutory purpose. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

Applying these principles, we conclue that § 841(b)(6) does not violate the equal protection principles implicit in the fifth amendment. The declared purpose of the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.*, is to protect the public health and welfare, and the legislative history of § 841(b)(6) indicates that that subsection was designed "to deter individuals and major criminal organizations involved in extensive [marijuana] trafficking operations." Sen. Rep. No. 96-916, 96th Cong., 2d Sess. 14, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2858, 2871. At the time the legislation was passed, such operations posed, in the estimation of Congress, a "grave" public health threat and represented an intractable problem because "the financial benefits of large scale marijuana trafficking [were] so lucrative that [then] current sanctions [were] viewed as an acceptable cost of doing business." *Id.* The decision to treat marijuana trafficking differently from trafficking in other non-narcotic Schedule I drugs was reasonable in light of common knowledge that, being more widespread, it posed a greater threat to public health.

The decision to treat trafficking in marijuana more harshly than trafficking in heorin also is a rational one. Congress could have concluded that extensive marijuana operations posed an even greater threat to the public health and welfare than heroin trafficking operations, reasoning that using marijuana is only the first step in becoming involved with more dangerous drugs, like heroin, and that marijuana was more likely to ensnare those who did not yet have drug problems. Also, it is well settled that the legislature may choose to attack a problem one step at a time. New Orleans v. Duke 427 U.S. at 305. Accordingly, we thing that § 841(b)(6) passes constitutional muster, because the decision to single out marijuana trafficking for

especially harsh penalties has the rational basis of protecting the public health by attacking the most pressing danger with the stiffest penalties.[1]

III.

Defendant's final argument is that the district court erred in denying his motion for recusal. After the jury returned its verdict, the defense filed a motion under 28 U.S.C. § 144, asking the district judge to recuse himself from any further proceedings in connection with the case. Recusal is required under § 144 when a party "makes and files a timely and sufficient affidavit that the judge has a *personal bias* or prejudice either against him or in favor of any adverse party." (emphasis added). Defendant maintains that he filed a sufficient affidavit alleging personal bias when he claimed that the judge "has established, in marijuana cases, certain minimum sentences" and that he "[is] determined to wipe out marijuana offenses through sentencing." These allegations seem to summarize fairly the district court's post-verdict remarks to the jury:

> Because I have established, say, in marijuana cases, a certain minimum sentence. And I don't like it. But at least in this area, different from Florida and New York, Judge Hawkins and I are determined we are going to wipe it out . . . but I have established a policy that if somebody who is a truck driver, for instance, or who is an unloader, and with no previous history of marijuana crime is going to get a certain amount. . . . And we are trying to stop it, Judge Hawkins and I here in Charleston, by meting out sentences that people will stay away from Charleston.

---

[1] Defendant also complains that the decision to use 1000 pounds of marijuana as the cut-off point was arbitrary. It seems clear, however, that it was not more arbitrary than any other line-drawing exercise. It certainly does not seem patently unreasonable to treat trafficking in amounts greater than 1000 pounds considerably more harshly than trafficking in lesser amounts.

Nevertheless, recusal was not required. Although there is some authority for the proposition that a judge committed to a mechanical sentencing policy for defendants found guilty of particular offenses is personally biased against that class and should recuse himself from sentencing proceedings for that class of defendants, United States v. Thompson, 483 F.2d 527 (3 Cir. 1973) (split decision), we think the better position is that such bias is judicial, not personal, since it does not stem from an extra-judicial source. United States v. Serrano, 607 F.2d 1145, 1150 (5 Cir. 1979); United States v. Thompson, 483 F.2d at 530 (Adams, J. dissenting).

Furthermore, even if the affidavit in this case had been sufficient to allege personal bias and thus require recusal, any error in denying the motion for recusal was harmless. At the actual sentencing, the district judge clearly did not follow a mechanical sentencing policy. Rather, he noted a variety of individualized considerations that prompted him to impose a nine-year sentence—six years less that the statutory maximum.[2]

Because the defendant has not established that he was the victim of a mechanical sentencing policy, he has no standing to raise the claim that the policy denies equal protection to other persons convicted of marijuana offenses in South Carolina.

AFFIRMED.

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[2] Accordingly, the defendant also is not entitled to resentencing under the line of cases holding that it is error for a court to follow a rigid sentencing policy based only on the crime committed because such an approach represents an abdication of the court's responsibility to exercise discretion in sentencing. *See, e.g.*, United States v. Hartford, 489 F.2d 652 (5 Cir. 1974).

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(2)

No. 84-333

# In the Supreme Court of the United States

OCTOBER TERM, 1984

STEVE RICHARDS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

REX E. LEE
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9 pp

## TABLE OF AUTHORITIES


Page

Cases:

*Dandridge* v. *Williams*, 397 U.S. 471 ..... 5

*Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 ..... 5

*Phillips* v. *Joint Legislative Committee*, 637 F.2d 1014 ..... 4

*Richardson* v. *Belcher*, 404 U.S. 78 ..... 5

*United States* v. *Grinnell Corp.*, 384 U.S. 563 ..... 4

*United States* v. *Serrano*, 607 F.2d 1145, cert. denied, 445 U.S. 965 ..... 4

*United States* v. *Thompson*, 483 F.2d 527 ..... 4

*Williamson* v. *Lee Optical Co.*, 348 U.S. 483 ..... 5

Statutes:

21 U.S.C. 841 ..... 1, 2, 4

21 U.S.C. 841(b)(1)(B) ..... 3

21 U.S.C. 841(b)(6) ..... 3

21 U.S.C. 846 ..... 1, 3

28 U.S.C. 144 ..... 2

Page

Miscellaneous:

126 Cong. Rec. (1980):

p. 11791 ..... 5

p. 11792 ..... 5

S. Rep. 96-916, 96th Cong., 2d Sess. (1980) ..... 5

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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No. 84-333

STEVE RICHARDS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner contends that the district court improperly sentenced him under a mechanical sentencing policy, that the district judge should have recused himself, and that the penalty provisions of 21 U.S.C. 841 deny him equal protection.

1. Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of conspiracy to possess some 2000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to nine years' imprisonment. The court of appeals affirmed (Pet. App. 1-7).

After the verdict was returned the judge stated to the jury:

> I have established, say, in marijuana cases, a certain minimum sentence. And I don't like it. But at least in this area, different from Florida and New York, Judge

> Hawkins and I are determined we are going to wipe it out. * * * I have established a policy that if somebody who is a truck driver, for instance, or who is an unloader, and with no previous history of marijuana crime is going to get a certain amount.

Pet. App. 6. Pointing to these statements, petitioner filed a motion under 28 U.S.C. 144 requesting the district judge to recuse himself from sentencing.[1] The judge denied the motion, ruling that the recusal motion had been filed out of time (C.A. App. 291),[2] and that, in any event, the quoted remarks indicated "at best, * * * only a judicial bias, not a personal bias" (*id.* at 294). The court then concluded that petitioner was "at the top of the totem pole" of the conspiracy (*id.* at 307), and it sentenced him to nine years' imprisonment.

The court of appeals affirmed petitioner's conviction and declined to disturb his sentence. The court concluded that the district judge was correct in declining to recuse himself because the "bias" he expressed "is judicial, not personal, since it does not stem from an extra-judicial source" (Pet. App. 7). Further, the court below ruled that any error on the recusal question was harmless: "At the actual sentencing, the district judge clearly did not follow a mechanical sentencing policy. Rather, he noted a variety of individualized considerations that prompted him to impose a nine-year

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[1]Section 144 provides that recusal is required when a party "makes and files a timely and sufficient affidavit that the judge * * * has a personal bias or prejudice either against him or in favor of any adverse party."

[2]Petitioner was convicted and the challenged remarks were made on March 9, 1983. Petitioner's recusal motion was filed on July 7, 1983, the day of his sentencing hearing. See C.A. App. 3. As noted above, 28 U.S.C. 144 requires that recusal motions and affidavits be filed in a "timely" fashion.

sentence * * *" (*ibid.*).[3] Finally, the court of appeals rejected petitioner's contention that 21 U.S.C. 841 violates equal protection concepts because it imposes stiffer penalties for trafficking in more than 1000 pounds of marijuana than it does for trafficking in other controlled substances.[4] The court explained that Congress's "decision to treat marijuana trafficking differently from trafficking in other * * * drugs was reasonable in light of common knowledge that, being more widespread, it posed a greater threat to public health" (Pet. App. 5).

2. In this Court, petitioner repeats the contentions rejected below. But as the court of appeals concluded, all are without merit.

Petitioner's argument (Pet. 5-7) that the district judge applied a mechanical sentencing policy finds no support in the record. As the court of appeals noted, the trial court based petitioner's sentence on "a variety of individualized considerations" (Pet. App. 7), including the depth of his involvement in the conspiracy and his apparently broad experience in the marijuana trade (C.A. App. 305-307). Indeed, in setting petitioner's term of incarceration, the judge explained that he "used every bit of information [he] had before [him]" (*id.* at 307). Thus the judge gave the various co-conspirators differing sentences, depending upon each one's degree of involvement in the crime;

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[3]The court of appeals did not address the district court's ruling that the recusal motion had not been filed in a timely fashion.

[4]Under 21 U.S.C. 841(b)(6) and 846, the maximum punishment for trafficking in or conspiring to traffic in more than 1000 pounds of marijuana is 15 years' imprisonment and a $125,000 fine. If the offense involves less than 1000 pounds of marijuana, or involves any quantity of other non-narcotic drugs, the maximum penalty is five years' imprisonment and a $15,000 fine. 21 U.S.C. 841(b)(1)(B).

petitioner's sentence was itself six years below the statutory maximum (see Pet. App. 7).[5]

Similarly, the court of appeals was correct in concluding that the district judge need not have recused himself. Recusal is appropriate only when a party alleges personal bias that "stem[s] from an extrajudicial source." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966). "Thus, a motion for disqualification ordinarily may not be predicated on * * * a demonstrated tendency to rule any particular way, nor on a particular judicial leaning or attitude derived from [a judge's] experience on the bench." *Phillips* v. *Joint Legislative Committee*, 637 F.2d 1014, 1020 (5th Cir. 1981). In this case, of course, the district judge's remarks did not indicate any personal prejudice against petitioner; they suggested only that drug trafficking is a serious crime and should be punished accordingly.[6] Recusal is not warranted in such circumstances. See *United States* v. *Serrano*, 607 F.2d 1145, 1150-1151 (5th Cir. 1979), cert. denied, 445 U.S. 965 (1980).[7]

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[5]As the district judge noted, even in his post-verdict remarks he did not suggest "that I did not consider * * * each defendant on a case-by-case basis" (C.A. App. 294). And while those remarks suggested that punishment is appropriate in marijuana cases, the judge explained that such a view "doesn't indicate that I've got any — what the minimum sentences are, one; or two, that I don't consider each case" (*ibid.*).

[6]The Third Circuit has suggested that recusal is appropriate when the district judge is biased against a class of offenders, such as those "charged with violation of Selective Service laws." *United States* v. *Thompson*, 483 F.2d 527, 529 (1973). But the court of appeals in that case emphasized that the district judge had declined "to tailor the sentence imposed to the circumstances surrounding each individual defendant." *Ibid.* (footnote omitted). Here, the judge did base petitioner's sentence on individualized considerations.

[7]In any event, because the district court's use of an individualized sentencing policy made any error in its recusal ruling harmless — and because petitioner has not challenged the district court's holding that the recusal petition was not timely filed (see note 2, *supra*) — review on this issue plainly is not warranted.

Finally, the penalty provisions of 21 U.S.C. 841 do not deny petitioner equal protection. Congress enhanced the penalties for trafficking in large quantities of marijuana because the previously existing "penalty structure, with respect to marihuana, [was] inadequate to deter individuals and major criminal organizations involved in extensive trafficking operations. Law enforcement officials have testified repeatedly that the financial benefits of large scale marihuana trafficking are so lucrative that current criminal sanctions are viewed as an accepted cost of doing business." S. Rep. 96-916, 96th Cong., 2d Sess. 14 (1980). See 126 Cong. Rec. 11791 (1970) (remarks of Rep. Carter). Given the substantial nature of the marijuana trade, Congress's decision to increase the applicable penalties plainly was rational. See *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971). That Congress did not increase the penalties for trafficking in other types of drugs (see note 4, *supra*) does not affect the propriety of its action with respect to marijuana; the legislature may act "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955).[8]

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[8]Petitioner's argument (Pet. 11) that Congress acted arbitrarily in choosing 1000 pounds as the threshhold for imposing enhanced penalties is without merit. Congress believed that operations involving such quantities were lucrative enough to deserve substantial punishments. See 126 Cong. Rec. 11791, 11792 (1980). A determination of this sort "does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), quoting *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

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